(6)

No. 06-729

Supreme Court, U.S.
FILED
JAN 26 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN PUBLIC WORKS ASSOCIATION, THE AMERICAN WATER WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL LEAGUE OF CITIES, AND THE NEW YORK CONFERENCE OF MAYORS IN SUPPORT OF PETITIONERS

ALEXANDRA D. DUNN
General Counsel, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

DAVID W. BURCHMORE*
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500

**Counsel of Record*

[Additional Counsel Listed Inside Front Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

KENNETH A. RUBIN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5140
Counsel for the American Water Works Association

DONNA M. GILIBERTO
General Counsel
NEW YORK CONFERENCE OF MAYORS
119 Washington Avenue
Albany, NY 12210
(518) 463-1185

CAROLYN COLEMAN, ESQ.
Director, Federal Relations
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 626-3023

TABLE OF CONTENTS

	Page
INTERESTS OF THE *AMICI*	1
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. CLEAN WATER ACT § 101(g) PROHIBITS THE RESULT REACHED BY THE COURT BELOW	7
A. Purpose of The Wallop Amendment	7
B. NPDES Permits Must Require Strict Compliance with Water Quality Standards Without Regard to Feasibility or Cost	11
II. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO INTER-BASIN TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES	13
A. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water	14
B. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water	14
1. Total Maximum Daily Loads and State Water Quality Management Plans	15
2. Municipal Separate Storm Sewer System Permits	16

TABLE OF CONTENTS – Continued

Page

3. The Safe Drinking Water Act and Surface Water Treatment Rule 17

4. State Laws and Regulations 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ackels v. EPA, 7 F.3d 862 (9th Cir. 1993) 12

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001) ..... *passim*

Defenders of Wildlife v. Browner, 197 F.3d 1035 (9th Cir. 1999) 12

Oklahoma v. EPA, 908 F.2d 595 (10th Cir. 1990) 12

Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292 (9th Cir. 1992) .....

National Wildlife Federation v. Consumers Power, 862 F.2d 580 (6th Cir. 1988) 14

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 9, 14

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 10

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) ..... *passim*

STATUTES

33 U.S.C. § 1251(g) [CWA § 101(g)] 6, 7, 9, 19

33 U.S.C. § 1313(d) [CWA § 303(d)] 15

33 U.S.C. § 1314(f)(2)(F) [CWA § 304(f)(2)(F)] 6, 14

33 U.S.C. § 1329 [CWA § 319] 15, 16

33 U.S.C. § 1342 [CWA § 402] 12, 16

33 U.S.C. § 1370 8

42 U.S.C. § 300(f) 17

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

40 C.F.R. § 122.44(d) 12

40 C.F.R. § 130.6(c) 16

40 C.F.R. § 130.7(a) 16

40 C.F.R. § 141.70 17

40 C.F.R. § 141.71 17

40 C.F.R. § 141.171 17

LEGISLATIVE MATERIALS

A Legislative History of the Clean Water Act of 1977 (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14 (1978) 8

STATE REGULATIONS

New York State Environmental Conservation Law

ECL § 15-0801 18

ECL § 15-0805 18

ECL § 17-0501 18

ECL § 17-0505 18

ECL § 17-1501 18

N.Y. Comp. Codes R. & Regs., tit. 6

Part 670 19

Part 670.1 19

Part 670.3 19

TABLE OF AUTHORITIES – Continued

Page

OTHER

Caher, "NYC Ordered to Pay $6M Penalty for Polluting Water," *New York Law Journal* (Feb. 7, 2003) 11

BRIEF OF THE AMERICAN PUBLIC WORKS ASSOCIATION, THE AMERICAN WATER WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL LEAGUE OF CITIES, AND THE NEW YORK CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

INTERESTS OF THE *AMICI*

The undersigned *amici curiae* represent a broad spectrum of local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring clean and safe water in our country. However, *amici* also have an interest in ensuring that suitable laws and regulations apply to their activities, and believe that the Second Circuit's ruling impermissibly interferes with local water management decisions.

Transfers and natural, untreated water play a key role in the design and operation of municipal water and flood control systems as well as in structures designed to assist in inland navigation. Countless water management systems throughout the country transfer water to areas that need it, or away from areas in danger of flooding. Operation of canals, locks, and other structures involves movement of water from one body – whether natural or constructed – to others. The Second Circuit's decision threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act (CWA).

---

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

The Second Circuit's decision would radically change the existing regulatory structure for local governments and other water management authorities by holding that inter-basin transfers of untreated water, in the context of routine water management activities, can only be authorized and managed by National Pollutant Discharge Elimination System (NPDES) permits. Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operates pursuant to such a federal permit. There is no indication in the language or history of the CWA that Congress intended the new law to apply to or to interfere with these structures' basic functions and historic operations.

The American Public Works Association (APWA) is an international educational and professional association of public agencies, private sector companies, and individuals dedicated to providing high quality public works goods and services. Originally chartered in 1937, APWA is the largest and oldest organization of its kind in the world, with 67 chapters throughout North America. APWA provides a forum in which public works professionals can exchange ideas, improve professional competency, increase the performance of their agencies and companies, and bring important public works-related topics to public attention in local, state and federal arenas. Working in the public interest, the 28,500 members of APWA design, build, operate and maintain transportation, water supply, sewage, and refuse disposal systems, public buildings and other structures and facilities essential to our nation's economy and way of life.

The American Water Works Association (AWWA) is the largest and oldest association of water professionals in the world. With over 60,000 members, it represents the full

spectrum of the water community, including utilities, individual members, consulting firms, manufacturers, academics, and environmental advocates. Its utility members represent both public and private utilities, from the nation's largest to the very smallest. Collectively, AWWA's utility members serve drinking water to about 80 percent of the American population.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another. AMWA is concerned that the Second Circuit's decision will have a particularly devastating effect in western states, whose water supply networks often rely on engineered transfers among various natural water bodies.

The National Association of Clean Water Agencies (NACWA) represents the nation's publicly-owned wastewater treatment agencies (POTWs). NACWA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. NACWA members operate their POTWs under the CWA's NPDES permitting program. NACWA members are concerned, however, that the Second Circuit's decision

unnecessarily will subject new aspects of their operations to NPDES permitting for the first time.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 member cities and for 49 state municipal leagues whose membership totals more than 18,000 cities and towns across the country. The specific interest of the NLC in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources. NLC is particularly concerned that, because this Court has not yet ruled directly on the central issue in this case, the conflict between the U.S. Environmental Protection Agency's (U.S. EPA's) historical position and the ruling of the Second Circuit leaves cities and other water management agencies in such a position of uncertainty that it is impossible to move forward with planning for vital water management programs.

The New York Conference of Mayors (NYCOM) is a not-for-profit, voluntary membership association consisting of 567 of the State's 616 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to all NYCOM members as they each have a direct role in ensuring clean and safe water, an interest in ensuring that suitable laws and regulations apply to their activities, and belief that the lower court's ruling impermissibly interferes with local water management decisions. The decision of the court below will have a disastrous effect on the finances of cities and villages in the State of New York, as it will require them to obtain

NPDES permits for similar water transfers and subject them to excessive penalty assessments and inconsistent enforcement actions by EPA and the courts.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the *Petition for Writ of Certiorari*.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision would burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. Due to the complete unsuitability of the NPDES program to these water management activities, in perhaps the majority of cases, local water management agencies would be unable to obtain or comply with NPDES permits for facilities that are essential to meeting many public health and safety needs, including flood control; ensuring a reliable supply of water for domestic, commercial, and industrial uses; and fire suppression.

Municipal and regional water management systems operated in the United States for decades before the 1972 enactment of the CWA. These systems are designed to move water from one body to another, or to change the flow of water. During the 30-plus years since its enactment, the CWA has never, until recently, been interpreted to regulate such transfers and diversions of untreated water. U.S. EPA has never required that such transfers and diversions operate pursuant to CWA NPDES permits. The NPDES permit program is the wrong tool to regulate water transfers and diversions, and the consequences of requiring NPDES permits for such activities will be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

Amici wish to emphasize that our fundamental interest is in protecting our nation's waters and providing safe drinking water to our citizens. We and our member organizations, governments, and utilities recognize our nation's dependence on a clean and safe supply of water. *Amici* are all engaged in activities that protect, treat, reclaim, improve, or otherwise respect water quality. In arguing that the NPDES program is not the appropriate mechanism for regulating transfers and diversions of untreated water, we do not suggest that such transfers and diversions should not be subject to regulation or that their water quality impacts should not be mitigated. However, as discussed below, there are other provisions in both federal and state law that were designed to ensure that water transfers and diversions are managed responsibly. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program.

Indeed, in promulgating the CWA itself, Congress established a separate provision – independent of the NPDES program – that specifically addresses water transfers and diversions. Congress directed U.S. EPA to develop "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). This provision makes it clear that Congress recognized that water management facilities should be treated differently from other dischargers, so as to ensure that water management for such public purposes as water supply, flood control, and navigation is not unreasonably restricted.

As described in the argument below, *amici* submit that CWA § 101(g), 33 U.S.C. § 1251(g), and decisions by several other Courts of Appeals, require that an "accommodation" be made between the CWA's NPDES program

requirements and the traditional authority of the States to allocate their water resources without unnecessary interference by federal regulation. *Amici* therefore urge this Court to grant the *Petition for Writ of Certiorari* and reverse the Second Circuit's decision.

ARGUMENT

I. CLEAN WATER ACT § 101(g) PROHIBITS THE RESULT REACHED BY THE COURT BELOW.

A. Purpose of The Wallop Amendment.

By holding that the City of New York must obtain an NPDES permit for the discharge from the Shandaken Tunnel, and that it is liable for a substantial penalty for failing to have done so in the past, the Second Circuit's decision comes into direct conflict with CWA § 101(g), 33 U.S.C. § 1251(g). That section, also known as the "Wallop Amendment," was added in 1977 to ensure that otherwise applicable requirements of the Act would not be applied in such a manner as to impermissibly interfere with state water rights. The section provides that:

> It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The sponsor of the amendment, Senator Wallop, explained during the Senate debates over the 1977 CWA that:

> The conferees adopted an amendment which will reassure the State that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems. . . . This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. This amendment does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local 208 planning units may also incidentally effect [sic] the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. ***It is the purpose of this amendment to insure that State allocation systems are not subverted,*** and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

Senate Debate, Dec. 15, 1977 (remarks of S. Wallop), *reprinted in A Legislative History of the Clean Water Act of 1977* (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14 (1978), at 531 (emphasis added).

As noted by Senator Wallop, CWA § 510, 33 U.S.C. § 1370, already provided that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." The 1977 amendment was designed to make it clear that,

although the requirements of the Act might "incidentally" affect individual water rights, state water allocation systems cannot be "subverted" by those incidental effects. The exact language of the amendment itself dictates that state water rights shall not be "superseded, abrogated or impaired" even by the legitimate purposes of the Act. Instead, state and federal agencies are directed to develop "comprehensive solutions" to control pollution "in concert with" programs for managing water resources.

Thus, although state water allocation systems are not immune or exempt from the CWA's requirements, where those requirements would have the effect of impairing the state's water rights some other solution or accommodation must be found. Several courts have recognized this principle. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 179 (D.C. Cir. 1982), the D.C. Circuit Court of Appeals considered the policy implications of requiring NPDES permits for dams. Although it recognized that Congress had not addressed the question directly, the court found that CWA § 101(g) provided a "specific indication in the Act that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component." The court noted that, while Section 101(g) "was not intended to take precedence over 'legitimate and necessary water quality considerations,'" Congress had incorporated several other provisions in the Act that were "intended to prevent water quality goals from interfering with state water allocation plans." *Id.* at 179 n. 67. The court also found that U.S. EPA's decision not to require NPDES permits for dams, and to leave dam regulation to the states, was reasonable and not inconsistent with Congressional policy in the Act because

> . . . dam-caused pollution is unique because its severity depends partly on whether other sources have polluted the upstream river. The NPDES program, however, requires EPA to issue nationally uniform standards, and thus would not allow

> the agency to take full account of the interrelationship between dam-caused pollution and other pollution sources. Moreover, dams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that state areawide water quality plans are the better regulatory tool.

Id. at 180.

Similarly, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 510 (10th Cir. 1985), Tenth Circuit found that the Wallop Amendment indicated

> "that Congress did not want to interfere any more than necessary with state water management." National Wildlife Federation v. Gorsuch, 224 U.S. App. D.C. 41, 693 F.2d 156, 178 (D.C.Cir.1982). A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation.

The court recognized that if the state involved in that case could not obtain a permit, or if the permit imposed infeasible conditions or restrictions, such an eventuality might have the impermissible effect of abrogating an interstate compact and denying the state its water use rights thereunder. *Id.*

More recently, this Court explicitly addressed the potential conflict between the Wallop Amendment and the application of the NPDES permit program to state water transfer projects. While remanding the case on other grounds, this Court recognized that:

> If we read the CWA to require an NPDES permit for every engineered diversion of one navigable

> water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. . . . Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. §1251(g).

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 108 (2004).

The precise point at which the imposition of otherwise applicable permitting or pollution control requirements of the CWA would become so costly or burdensome as to violate Section 101(g) has never been directly confronted by any court. *Amici* submit, however, that the decision of the Second Circuit in this case has crossed that line. The court has ordered the City to obtain a permit that requires the imposition of controls presenting significant technical and environmental challenges. The court has also sustained the imposition of a fine that is reportedly the largest civil penalty ever imposed on a municipality under the CWA. *See* Caher, "NYC Ordered to Pay $6M Penalty for Polluting Water," *New York Law Journal* (Feb. 7, 2003). In doing so, the court below has unquestionably "superseded, abrogated or impaired" the rights of this state-sanctioned water supply program.

B. NPDES Permits Must Require Strict Compliance with Water Quality Standards Without Regard to Feasibility or Cost.

The CWA explicitly dictates that NPDES permits *cannot* be issued to point source dischargers unless the

discharge will meet "all applicable requirements" of the Act, including "any more stringent limitation" necessary to meet state water quality standards. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1). The applicable water quality standard for discharges of turbid waters in New York is "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (2003). Because there may not be a practicable way to ensure that discharges from the Shandaken Tunnel are never more turbid than the receiving waters, requiring an NPDES permit for such discharges creates a number of environmental and public health challenges. This could lead to the curtailment of New York City's use of this water supply, jeopardizing the City's ability to ensure an adequate supply to its residents.

Even without the record established in this case, any categorical ruling that the type of water transfer system at issue must be regulated under the NPDES permit program would give rise to the same conflict. Water quality-based effluent limitations must be achieved without regard to feasibility or cost. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163, as amended by 197 F.3d 1035 (9th Cir. 1999). Thus, U.S. EPA "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability." *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992). *See also Ackels v. U.S. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (holding that a permit must require compliance with state water quality standards for turbidity, even if it was not feasible to control this parameter, because "economic and technological restraints are not a valid consideration").

U.S. EPA's implementing regulations for the NPDES permit program embody this requirement in 40 C.F.R. § 122.44(d). This requirement is applicable to *all* NPDES

permits, both "individual" and "general." Consequently, this Court's suggestion in *Miccosukee* that EPA might be able to "control regulatory costs" through the use of general permits is misplaced. Although general permits can reduce administrative burdens by authorizing discharges from a specified category of dischargers, they cannot deviate from the water quality-based effluent limitations that are required for the issuance of all NPDES permits.

Due to the natural biochemical differences between distinct bodies of untreated water, transfers of water between these bodies will always result in a mixing of such constituents. If the Second Circuit's decision is left to stand, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes (including other portions of New York City's water supply system) face an impossible dilemma: either to face continual enforcement actions involving civil and even criminal penalties, or to cease or curtail fundamental public water supply and water management activities.

II. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO INTER-BASIN TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES.

Because the NPDES program lacks both the administrative capacity and the regulatory flexibility necessary to deal appropriately with transfers and diversions of untreated water, the Second Circuit's decision would compromise the continued operation of water supply and management systems across the nation. There are numerous federal and state laws that more appropriately and effectively regulate water transfers and diversions than the NPDES provisions of the CWA.

A. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.

Under the CWA, Congress directed U.S. EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," in one of several statutory provisions addressing nonpoint sources of pollution. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate Federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, CWA § 304(f), 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. *See National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 588 (6th Cir. 1988) (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177 (D.C. Cir. 1982)) ("This supports . . . the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution").

B. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water.

In urging rejection of the NPDES program as the tool to manage the incidental water quality impacts of water movement structures such as the Shandaken Tunnel or the S-9 pumps at issue in *Miccosukee*, the *amici* do not suggest that such structures should not be evaluated and regulated to address water quality impacts. Rather, we ask the Court to recognize that other provisions of federal and state law, such as those described below, provide more appropriate mechanisms to address any water quality impacts from inter-basin transfers of untreated water.

1. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on a state's impaired waters list under the CWA and will therefore be subject to the development of total maximum daily loads (TMDLs). CWA § 303(d), 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources via NPDES permits, and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate planning tool to assess pollutant loadings and to select the mechanisms that will regulate and control pollutants in the water bodies at issue both in *Miccosukee* and in this case, because, in both instances, the pollutants were originally added to the water being transferred by nonpoint sources, and the TMDL program, unlike the NPDES program, considers the relative contributions of both point and nonpoint sources of pollution.

In addition to the TMDL program, states must establish Water Quality Management (WQM) Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. CWA § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A). A WQM Plan "identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution . . . in amounts which contribute" to the failure to meet water quality standards. CWA § 319(a)(1)(B), 33 U.S.C. § 1329(a)(1)(B). A WQM Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been

implemented to control pollution from those sources. CWA § 319(a)(1)(C) and (D), 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii). Once approved, TMDLs are incorporated into a state's WQM Plan. 40 C.F.R. § 130.7(a).

The major source of the pollutant of concern in *Miccosukee* was urban runoff, generally a nonpoint source. Similarly, in this case, turbidity and suspended solids enter the Schoharie Reservoir mainly through nonpoint sources, and result from both natural conditions in the Schoharie watershed and human activity such as farming, logging, development, and streambank and streambed disturbances. The appropriate place to address the pollutants in both cases is where they enter the water. The means to address them are the CWA's nonpoint source programs, including the TMDL program and state WQM plans.

2. Municipal Separate Storm Sewer System Permits

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff than requiring individual NPDES permits for the transfers of water containing such pollutants. For example, stormwater discharges are regulated as "point sources" under the NPDES program because stormwater from activities most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points.

Municipalities required to obtain permits for their municipal separate storm sewer systems (MS4s) are required to implement best management practices to reduce stormwater pollutants to the "maximum extent practicable" (MEP) CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). Thus, to the extent that the pollutants of concern in a water transfer or diversion come from

urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources. The Second Circuit's decision, in contrast, would regulate such pollutants after they have entered the waters of the United States, essentially requiring water transfer facilities to "treat" these pollutants – which were introduced by other sources – in the course of diverting, pumping, or moving the water. This indirect and impractical approach focuses regulation at the wrong location, and imposes pollution control responsibilities on the wrong parties.

3. The Safe Drinking Water Act and Surface Water Treatment Rule

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) et seq., and its implementing regulations, the so-called Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 et seq. The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the criteria that must be met for a public water system to avoid filtration. See 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 Nephelometric Turbidity Units (NTU) immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

The facts of this case provide an example of how water transfers are already appropriately reviewed, managed, and regulated. Because New York City's Catskill system supplies unfiltered water to the City of New York, it operates under a Filtration Avoidance Determination (FAD) issued by the U.S. EPA under 40 C.F.R. §§ 141.71 and 141.171. The FAD contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources. It specifically requires the City to address suspended solids and turbidity

entering the source waters of the Schoharie Reservoir, and to implement any feasible, effective and cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel. Thus, the pollutants at issue in this case are being addressed under the SDWA and SWTR, both 1) at the location where they enter the water system and 2) after water is released through the Shandaken Tunnel.

4. State Laws and Regulations

In addition to these federal requirements, a number of state laws and regulations address and control pollutants in the context of municipal water management and water transfers. Those which apply in New York are an example of the types of programs that exist in varying forms throughout the nation. Reservoir releases that violate state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. New York State Environmental Conservation Law (ECL) § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's State Pollutant Discharge Elimination System (SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters. ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel.

Finally, New York State directly regulates reservoir releases in order to protect receiving waters. ECL §§ 15-0801 and 15-0805. New York City is expressly required to make releases from its Shandaken Tunnel to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R.

& Regs. tit. 6, Part 670 (Reservoir Releases Regulations). The provisions of this rule offer a perfect example of the type of state water allocation system – balancing the competing interests of public water supply needs, recreational uses and environmental protection – that Congress intended to protect under the Wallop Amendment. The purpose of the rule is

> to regulate the volume and rate of change of diversions of water from the Schoharie reservoir through the Shandaken tunnel into Esopus Creek, in order to protect and enhance the recreational use of waters in Esopus Creek in a manner consistent with the protection of existing recreational uses of the Ashokan and Schoharie reservoirs, while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.1. Detailed provisions govern the operation of the Shandaken Tunnel, monitoring of releases, and consultation with the State Department of Environmental Conservation. The Department may dictate specific actions for the purpose of "protecting the fishery or other natural resources of Esopus Creek" or "protecting the fishery or other natural resources of Schoharie reservoir or Ashokan reservoir." *Id.* at § 670.3.

Under the Second Circuit's decision, this carefully-designed water allocation system would be superseded by the inflexible requirements of the federal NPDES program. Such a result is in direct conflict with the intent of Congress as set forth in CWA § 101(g), 33 U.S.C. § 1251(g), which preserves the authority of state and local agencies to develop "comprehensive solutions" to protecting the environment "in concert with programs for managing water resources."

CONCLUSION

For each of the foregoing reasons, *amici* respectfully request that the petition for certiorari be granted and that the decision of the Second Circuit be reversed.

Respectfully submitted,

DAVID W. BURCHMORE*
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500
**Counsel of Record*

ALEXANDRA D. DUNN
General Counsel,
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

KENNETH A. RUBIN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5140
Counsel for the American Water Works Association

DONNA M. GILIBERTO
General Counsel
NEW YORK CONFERENCE OF MAYORS
119 Washington Avenue
Albany, NY 12210
(518) 463-1185

CAROLYN COLEMAN, ESQ.
Director, Federal Relations
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 626-3023